(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Consumers Scrap Recycling, Inc.	)	CAA Appeal No. 02-06
	)	CWA Appeal No. 02-06
Docket Nos. CAA-5-2001-002,	)	RCRA (3008) Appeal No. 02-03
CWA-5-2001-006,	)	MM Appeal No. 02-01
RCRA-5-2001-008,	)	
MM-5-2001-001	)	

[Decided January 29, 2004]

DECISION AND REMAND ORDER

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

CONSUMERS SCRAP RECYCLING, INC.

CAA Appeal No. 02-06
CWA Appeal No. 02-06
RCRA (3008) Appeal No. 02-03
MM Appeal No. 02-01

DECISION AND REMAND ORDER

Decided January 29, 2004

Syllabus

EPA Region V appeals an interlocutory order issued by Administrative Law Judge Spencer T. Nissen in a case filed against Consumers Scrap Recycling, Inc. ("Respondent") based on alleged violations of the Clean Air Act ("CAA") and the Resource Conservation and Recovery Act ("RCRA") at Respondent's scrap metal recycling facility. In particular, the Region's complaint alleged that Respondent had failed to obtain verification of removal of chlorofluorocarbons (CFCs) from certain appliances prior to salvaging activities as required by the CAA (Count I), and further violated the CAA by not maintaining records of such verification (Count II). In terms of RCRA violations, the complaint alleged, among other things, that Respondent was subject to RCRA's used oil management requirements by virtue of its processing of waste oil reclaimed from salvaged metal drums and had violated those requirements by failing to properly register its activities with government agencies and by failing to prepare a waste analysis plan.

In an accelerated decision, the ALJ merged Counts I and II of Region V's Complaint and denied accelerated decision as to these counts, and dismissed with prejudice the RCRA counts on the ground that Respondent was not a processor of used oil and, as such, was not subject to the relevant RCRA requirements. By previous order, the Board granted the Region's motion for interlocutory review of the ALJ's accelerated decision. The Region argues on appeal that the ALJ erred in merging Counts I and II of the Complaint, in denying the Region's motion for accelerated decision on these counts, and in dismissing the RCRA counts.

Held:

1. Because the relevant record-keeping requirements under the CAA apply only to CFC-removal verification records actually "obtained" in the first instance, and because in this case no such records for CFCs were obtained, the ALJ did not err in concluding that Respondent could not be penalized for violating both the requirement to obtain records

and the requirement to maintain such records once obtained. This outcome is not inconsistent with the Congressional directive in the CAA that violators be penalized on a "per requirement" basis. Rather, the Board finds a rational dichotomy under the regulations that treats the failure to obtain records as a violation of 40 C.F.R. §82.156(f), and a failure to maintain records once obtained as a violation under 40 C.F.R. §82.166.

2. The Board upholds the ALJ's decision not to grant the Region's motion for accelerated decision as to the CAA counts of the Complaint. While an evidentiary hearing may well lead to the conclusion that Respondent's factual contentions cannot prevail, the Board cannot, on the record before it, conclude that they are so clearly neither genuine nor material as to warrant reversing the ALJ's decision to allow them to be developed further through an evidentiary hearing. Nonetheless, the Board reverses a subsidiary determination by the ALJ that certain records maintained by Respondent were, as a matter of law, valid verification records.

3. The Board reverses the ALJ's dismissal of the RCRA counts of the complaint and his conclusion based on the undeveloped record before him that Respondent is a waste oil generator and not a waste oil processor. The Board finds that there are predicate factual issues that preclude the entry of an accelerated decision and thus reverses the ALJ and remands the RCRA issues for further factual development.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Fulton:

On March 17, 2003, the Director of the Air and Radiation Division and the Chief of the Enforcement and Compliance Assurance Branch, Waste, Pesticides, and Toxics Division, United States Environmental Protection Agency Region V ("Region V"), filed an appeal in this matter with the Environmental Appeals Board ("Board"). *See* Complainants' Brief Supporting Interlocutory Appeal of April and August 2002 Orders of Presiding Officer ("Appeal Brief"). Region V seeks interlocutory review of Administrative Law Judge Spencer T. Nissen's ("ALJ") April 12, 2002 Order on Cross-Motions for Accelerated Decision, 2002 WL 598836 (hereinafter "Accelerated Decision") and his August 22, 2002 Order Denying Motion for Interlocutory Appeal, 2002 WL 2005522 (hereinafter "Interlocutory Order").

In his Accelerated Decision, the ALJ: (1) merged and denied motions for accelerated decision as to Counts I and II of Region V's Complaint on the basis that there was a genuine issue of material fact

regarding whether Consumers Scrap Recycling ("Consumers") violated section 608(c) of the Clean Air Act ("CAA"), 42 U.S.C. § 7671g; (2) granted accelerated decision as to Count III because Consumers conceded that it had violated section 311 of the Clean Water Act ("CWA"), 33 U.S.C. § 1321; and (3) dismissed with prejudice Counts IV and V of the Amended Complaint on the basis that Consumers was not a processor of used oil and, as such, was not subject to the requirements at sections 299.9813(3) and (7) of the Michigan Administrative Code, which are directly enforceable under section 3008(a) of the Resource Conservation Recovery Act ("RCRA"), 42 U.S.C. § 6928(a).[1]

In his Interlocutory Order, the ALJ denied Region V's request for certification for interlocutory review of the ALJ's merger of, and denial of motions for accelerated decisions as to Counts I and II, and his dismissal of Counts IV and V. The ALJ denied Region V's request based on his determination that Region V failed to meet the requirements for obtaining such review.

Notwithstanding the ALJ's denial of Region V's request for certification for interlocutory review, the Board granted Region V's Request for Interlocutory Review ("Request") for the following reasons: (1) Consumers filed for liquidation under Chapter 7 of the Bankruptcy Code, making it possible that this might prove the only occasion for

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[1] On October 16, 1986, pursuant to section 3006(b) of RCRA, 42 U.S.C. § 6926(b), and 40 C.F.R. part 271, subpart A, the State of Michigan was granted final authorization to administer a hazardous waste program in lieu of the federal hazardous waste management program established under RCRA Subtitle C, 42 U.S.C. §§ 6821-6939e. *See* Michigan; Final Authorization of State Hazardous Waste Management Program, 51 Fed. Reg. 36,804 (Oct. 16, 1986). The authorized Michigan RCRA program was incorporated by reference into the *Code of Federal Regulations*. *See* 54 Fed. Reg. 7420 (Feb. 21, 1989). Accordingly, for purposes of this case, Michigan's regulations are the operative regulations for those aspects of RCRA for which the state program is authorized. *In re M.A. Bruder & Sons, Inc.,* RCRA Appeal No. 01-04, slip op. at 5 n.3 (EAB, July 10, 2002), 10 E.A.D. __. In addition, the U.S. Environmental Protection Agency ("EPA" or the "Agency") has the authority pursuant to RCRA § 3008(a)(1), 42 U.S.C. § 6928(a)(1), to enforce any requirement of the authorized Michigan program. *Id; In re Bil-Dry Corp.*, 9 E.A.D. 575, 576 n.1 (EAB 2001); *In re Rybond*, *Inc.,* 6 E.A.D. 614, 616 n.1 (EAB 1996); *In re CID-Chem. Waste Mgmt. of Ill., Inc.,* 2 E.A.D. 613 (CJO 1988).

Board review of the issues of concern; (2) to conserve Agency resources by avoiding the potential for two hearings, rather than a single hearing before the ALJ; and (3) because this case presents several issues of first impression for the Board.[2] *See* Order Granting Request for Interlocutory Review (EAB, Jan. 22, 2003).

For the reasons outlined below, we affirm a number of aspects of the Accelerated Decision, but find that the ALJ committed error in several respects and remand this matter for further proceedings consistent with the Board's opinion.

I. *BACKGROUND*

Since April 1983, Consumers has owned and operated a scrap facility located at 7777 West Chicago Avenue, Detroit, Michigan (the "Facility"). *See* Consumer Answer to Complaint ("Answer") ¶ 21. Consumers receives scrap metal, *id*. ¶ 19, including small appliances, such as refrigerators and window air conditioners, from a variety of suppliers, *id.* ¶ 31. Consumers sorts through this scrap metal to collect certain metals, such as precious metals from computer circuit boards, and eventually crushes or bales this scrap metal. *Id*. ¶ 33.

In addition, Consumers receives 55-gallon drums containing scrap metal in the form of metal chips or turnings that are coated with used oil. *Id*. ¶ 47. Consumers punches holes in these 55-gallon drums and places them on a screen above a 1,000-gallon capacity drum catch basin ("catch basin") so that the used oil is physically separated from the metal chips and collects in the catch basin to be picked up by a used-oil re-refiner, Safety-Kleen. *Id*. ¶¶ 49-50; *see also* Complainant's Exhibit ("C Ex") 1 at Response to Questions ("Resp.") 59.

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[2] Specifically, the issues of first impression identified in the Board's January 22, 2003 Order are: (1) whether a respondent may be charged both with failing to either recover refrigerant or verify refrigerant evacuation, and with failing to maintain records of verification of refrigerant evacuation; (2) the scope of the definitions of "used oil processor," and free-flowing," in the CFC regulations; and (3) the meaning of the term "contract" in the context of the CFC regulations.

A. *Statutory and Regulatory Background*

1. *Clean Air Act*

Subchapter VI of the CAA, which was added as part of the 1990 amendments, contains requirements for controlling substances that deplete the stratospheric ozone layer, that is, the layer that protects the earth from the penetration of harmful ultraviolet ("UV") radiation. *See* 42 U.S.C. §§ 7671-7671q. The legislative history of Subchapter VI makes Congress' intent in enacting the 1990 amendments quite clear: the concern over increased rates of disease in humans, including increased incidence of skin cancer, cataracts, and suppression of the immune system, as well as damage to crops and marine resources caused by a decrease in the stratospheric ozone layer, warranted a prohibition against the venting or release of ozone-destroying CFCs in a manner that allows such substances to enter the environment. *See* S. Rep. No. 101-228, at 376 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3760-68.

Congress directed the United States Environmental Protection Agency ("EPA" or "Agency") to promulgate regulations that "include provisions to foster implementation of this prohibition" against the "venting, releasing, or disposing of any substance used as a refrigerant." *See* S. Rep. No. 101-228, at 3778-79 (1990). Section 608(a)(1) of the CAA provides the Agency with broad authority to promulgate regulations establishing standards and requirements regarding the use and disposal of CFCs during the service, repair, or disposal of appliances. 42 U.S.C. § 7671g(a)(1).

Pursuant to Congress' directive, the Agency promulgated regulations, *see* 58 Fed. Reg. 28,660 (May 14, 1993), which require, among other things, that the party taking the final step in the disposal process (including but not limited to scrap recyclers and landfill operators) of a small appliance, room air conditioning, motor vehicle air conditioners ("MVACs") or MVAC-like appliances either recover refrigerant in accordance with specified procedures or verify that the refrigerant was previously evacuated. *See* 40 C.F.R. § 82.156(a).

The Agency explained further in the preamble to the final rule that persons taking the final step in the disposal process are expected to make good faith efforts to comply by, for example, "sending a letter to suppliers stating that refrigerant must be removed before equipment is accepted, posting signs at intake locations stating the facility's requirements regarding proper CFC removal, and requiring certification that CFCs have been removed." *See* 58 Fed. Reg. at 28,703. The Agency further explained that, in the case of final disposers who exercise the verification option, "the certification should reflect that refrigerant was properly removed (i.e. according to the standards set out in this regulation)." *See id.* at 28,704. Finally, the Agency noted that disposers could under some circumstances achieve verification by contract as a means of lessening the administrative burden associated with verification. Specifically, in cases where there was reliability in the pre-shipment removal of CFCs due to a long-term relationship between the final disposer and its supplier, the disposer could execute a contract with the supplier for CFC verifying CFC removal relative to a shipment of small appliances, rather than obtaining a separate verification from the supplier for each appliance. *See id.* Records relating to verification must be maintained on-site for a minimum of three years. 40 C.F.R. § 82.166(i), (m).

2. *Resource Conservation and Recovery Act*

In 1980, Congress supplemented RCRA Subtitle C[3] with the Used Oil Recycling Act of 1980 ("UORA"). *See* Pub. L. No. 96-463, 94 Stat. 2055 (1980) (codified as amended in scattered sections of 42 U.S.C. § 6901 *et seq*.). The UORA provides, in relevant part, that:

> (2) technology exists to re-refine, reprocess, reclaim, and otherwise recycle used oil;

[3] Subtitle C regulates both newly generated solid wastes that are hazardous and, under certain circumstances, the cleanup of hazardous waste disposal sites. *See* 42 U.S.C. §§ 6921-6939e.

> (3) used oil constitutes a threat to public health and the environment when reused or disposed of improperly;
>
> and that, therefore, it is in the national interest to recycle used oil in a manner which does not constitute a threat to public health and the environment and which conserves energy and materials.

42 U.S.C. § 6901a. Consistent with this declaration, EPA promulgated regulations governing the management of used oil.[4] *See* 57 Fed. Reg. 41,566, 41,566-67 (Sept. 10, 1992). These regulations establish minimum requirements applicable to used oil generators, transporters, processors, re-refiners, marketers, and off-specification used oil burners. *See* 40 C.F.R. §§ 279.51-.52, -.54-.58; *see also* Mich. Admin. Code r. 299.9813. In addition, these regulations generally establish controls on the storage of used oil, tracking and record-keeping requirements, and standards for the cleanup of releases of used oil to the environment. *Id*.

Under the approved Michigan regulations, which are the operative regulations for purposes of this case, a "used oil processor/re-refiner" is generally defined under the regulations as "a facility that processes used oil." *See* Mich. Admin. Code r. 299.9109(z); 40 C.F.R. § 279.1. While the term "processes" is not defined, the term "processing" is defined as follows:

> Processing means chemical or physical operations designed to produce from used oil, or to make used oil more amenable for production of, fuel oils, lubricants, or other used oil-derived products. Processing includes all of the following:

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[4] "Used oil" is defined as "any oil which has been refined from crude oil, or any synthetic oil, which has been used and which as a result of the use, is contaminated by physical or chemical impurities." Mich. Admin. Code r. 299.9109(p); *see also* 40 C.F.R. § 279.1 (defining "used oil" as "any oil that has been refined from crude oil, or any synthetic oil that has been used and as a result of such use is contaminated by physical or chemical impurities").

(i) Blending used oil with virgin petroleum products.
(ii) Blending used oils to meet the fuel specifications.
(iii) Filtration.
(iv) Simple distillation.
(v) Chemical or physical separation.
(vi) Re-refining.

Mich. Admin. Code r. 299.9106(t); 40 C.F.R. § 279.1.

Used oil processors must notify the Agency of its used oil processing activities, *see* Mich. Admin. Code r. 299.9813(3), (7); 40 C.F.R. § 279.51(a), and prepare a waste analysis plan, *see* Mich. Admin. Code r. 299.9813(3), (7); 40 C.F.R. § 279.55.

B. *Regulatory Activity at Consumers' Facility*

At the request of the City of Detroit Department of Environmental Affairs, which had received citizen complaints about the Facility, Region V initiated a multimedia compliance investigation of the Facility by conducting inspections on July 15 and 21, 1999. During those inspections, Region V identified the alleged violations catalogued below.

1. *CAA Violations*

During the July 15, 1999 inspection, Region V environmental engineer, Joseph Cardile, observed many piles of unprocessed mixed scrap consisting of commercial and residential items. C Ex. 18 ¶ 7. Specifically, Mr. Cardile observed parts of one or two window air conditioners and five refrigerators in the piles of mixed scrap at the Facility. *Id*. ¶¶ 8-11. According to Mr. Cardile, one window air conditioner had been dumped inside an opening of a refrigerator, *id*. ¶ 8, all of the refrigerators were missing their doors, two refrigerators were severely dented, *id.,* and scrap could be seen protruding from the opening of one of the refrigerators, *id.* ¶ 9.

Based on his observation that all of the small appliances were disassembled, were co-mingled with, and even contained other types of scrap, and that many were severely dented, Mr. Cardile concluded that "none of the refrigerators or air conditioners could be used other than for salvage parts." *Id*. ¶¶ 8, 9, 13. Mr. Cardile also observed that the cooling systems of some of these appliances were plainly visible, *id.* ¶¶ 8, 10, and that none bore tags certifying that refrigerant had been evacuated, *id*. ¶¶ 8-11.

Upon questioning, Consumers' plant supervisor, Mr. Maynard Blach,[5] stated that Consumers did not perform on-site recovery of refrigerants from the small appliances it received. *Id*. ¶ 14. Additionally, Mr. Blach stated that Consumers did not collect written verification statements from its suppliers of small appliances, and did not have records or copies of tags or stickers from its suppliers of small appliances certifying to refrigerant evacuation. *Id.* Further, Mr. Blach stated that Consumers did not have contracts with any suppliers of small appliances to recover refrigerant, and that Consumers conducted visual inspections[6] of the small appliances it received to determine whether they contained refrigerant. *Id*. Finally, Mr. Blach informed Mr. Cardile that Consumers would institute a policy of not accepting appliances containing refrigerant in the future. *See* Memorandum from Joseph Cardile, Environmental

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[5] As plant supervisor of the Facility, Mr. Blach is responsible for ensuring that Consumers complies with all applicable environmental regulations. *See* C Ex 1 at Resps. 5-6; *see also* Answer ¶¶ 31-33.

[6] Specifically, Consumers asserted that the visual observation consisted of examining the small appliances to observe whether the refrigerant lines had been cut. *See* C Ex 1 at Resps. 19, 25; C Ex 2. We note that the Agency has specifically observed that such a method is an unacceptable method of recovering refrigerant. *See* 58 Fed. Reg. 28,660, 28,704 (May 14, 1993) ("The procedures mentioned by a few commenters that scrap recyclers or landfill operators tell suppliers to simply 'cut the refrigerant lines' before delivering equipment to them are clearly unacceptable because they direct the supplier to violate the statute and the regulations. The knowing release of refrigerant to the atmosphere is a violation of the venting prohibition and accepting certification that equipment has been properly evacuated knowing that the certification is false is a violation of the regulation."). Thus, inasmuch as disposers may only rely on verifications that reflect proper removal, Consumers' method of verification provides no defense.

Engineer, Air Enforcement and Compliance Assurance Section, to File at 3 (Oct. 20, 1999).

On January 13, 2000, Region V issued a finding of violation ("FOV") to Consumers pursuant to CAA § 113, 42 U.S.C. § 7413. *See* C Ex 9. The FOV cited violations of section 608(c) of the CAA and 40 C.F.R. §§ 82.156(f) and 82.166(i). *Id*.

In response, Consumers denied knowingly receiving refrigerators, air conditioning units, or similar small appliances containing refrigerant. *See* C Ex 4. Consumers maintained that refrigerators containing refrigerant were sometimes dumped in front of the Facility after normal business hours by members of the public and asserted that these dumped refrigerators "are almost always already depleted of their refrigerant." C Ex 10 at 1. Consumers also stated that it sometimes received refrigerators containing refrigerant "mixed in a load of scrap in a roll-off box from a customer." *See* C Ex 4 ¶ 6. Consumers asserted that it made such refrigerators available to its employees for their personal use or placed them in the Facility's break rooms, C Ex 1 at Resp. 21, or temporarily stored them and made arrangements for their refrigerant to be properly drained. C Ex 4 ¶ 6. With respect to the small appliances observed by Mr. Cardile during the July 15, 1999 inspection, Consumers stated that it had "no records indicating [their] receipt" and that they had been "pulled from the scrap pile and placed in service at 7777 W. Chicago." *See* C Ex 1 at Resp. 29.

In addition, Consumers identified Refrigeration Services, Inc. ("RSI") and Environmental Specialty Services, Inc. ("ESS") as two customers who sent small appliances to Consumers for disposal. *See* C Ex 1 at Resp. 15. With respect to the small appliances supplied by RSI, Consumers asserted the following:

> We have never had a written contract with RSI. Our acceptance of their material was based on two points,

> the first being their *verbal assurance*[7] that all refrigerants would be drained properly and the second that each unit would have a sticker attached indicating that that unit had been drained.

C Ex 10 at Resp. 22 (emphasis added).

Information Requests sent by Region V to RSI and ESS on November 9, 2000, established that: (1) RSI had sent at least six loads of small appliances to Consumers from January 1996 to November 2000, *see* C Ex 1 at Resp. 20, which the Region estimated to be 554 appliances based on RSI's Activity Log, *see* C Ex 2; (2) ESS had sent between 1,327 and 1,665 window air conditioning units to Consumers from September 2000 to November 2000, *see* C Ex 3 at Attached Invoices; and (3) between January 1, 1996 and May 2000, Consumers periodically delivered a dumpster to RSI's premises for the disposal of small appliances and miscellaneous parts. *See* C Ex 2 at Resps. 5-6.

RSI asserted that it "always removed all refrigerants prior to placing material in [Consumers'] dumpster," that it verified refrigerant recovery, and that it placed recovery certification tags[8] on all appliances prior to releasing them from its premises. C Ex 2 at Resp. 6, 15. ESS indicated that its shipments between September 2000 and November 2000 were the only occasions on which it did business with Consumers and that it had relied on a subcontractor, Bumler, to remove refrigerant from the appliances it supplied to Consumers. *See id.* at Resp. 11. Further, ESS stated that Bumler certified refrigerant evacuation by placing tags on the appliances. *See id*. Consistent with its admission that

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[7] It bears noting that Consumers did not argue, nor is there evidence to establish, that these verbal assurances constitute a verbal contract.

[8] Consumers did not produce these certification tags because they were allegedly stickers that adhered to the appliances. *See* C Ex 1 at Resp. 20. RSI did, however, produce its blank certification tag, *see* C Ex 2, but the Region argues that this tag is facially deficient because it does not contain information required by 40 C.F.R. § 82.156(f)(2). This issue is discussed in section II.A.2.a.ii.

it did not maintain records of verification of refrigerant removal, Consumers could not produce these tags or copies of them.

Based on this information, Region V maintains that Consumers accepted from RSI and ESS at least 2,225[9] small appliances, such as refrigerators and window air conditioning units, between January 1, 1996, and November 1, 2000. Region V has further maintained that Consumers neither recovered refrigerant from these 2,225 small appliances nor verified refrigerant evacuation in a manner consistent with the applicable regulations.[10]

While Consumers did concede in its Answer to the Complaint that from January 1, 1996, until November 1, 2000, it did not collect statements verifying refrigerant evacuation from suppliers other than RSI, and that it did not have refrigerant recovery contracts from any suppliers, *see* Answer ¶¶ 32.b and 32.c, it nonetheless points to a letter dated November 17, 2000, apparently as an indication of a contractual arrangement for the removal of refrigerant. In the letter, which was signed by ESS and Consumers, ESS "certifie[d] that all refrigerant * * * that has not been leaked previously will be recovered from appliances to be delivered under this contract of sale prior to delivery." C Exs 1, 3, at Attachments. Region V, however, argues that the November 17, 2000 letter is not a contract within the meaning of 40 C.F.R. § 82.156(f)(2) because: (1) ESS denied having a contract with Consumers for refrigerant removal; (2) the letter failed to contain language required by section 82.156(f)(2); and (3) the letter was dated after the shipments of small appliances at issue in this case. *See* Appeal Brief at 51-55.

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[9] According to Region V, it arrived at a figure of 2,225 small appliances by adding the six small appliances it observed during the July 15, 1999 inspection, the 1,665 window air conditioners it determined ESS shipped to Consumers, and the 554 appliances it determined that RSI shipped to Consumers. *See* Appeal Brief at 9 n.4; *see also* Accelerated Decision, 2002 WL 598836, at *5.

[10] Region V based this conclusion on Consumers' admission that it did not have a contract with any of its customers supplying small appliances to recover refrigerant and on Consumers' inability to produce tags certifying that refrigerant had been evacuated. *See* C Ex 1 at Resps. 19, 25.

2. *RCRA Violations*

During the July 21, 1999 inspection, Region V biologist, Ross Powers, observed various drums and tanks located at the Facility. C Ex 19. Specifically, Mr. Powers observed a 1,000-gallon catch basin, as well as 55-gallon drums positioned for draining on top of the catch basin, and oil from the drums in or around the catch basin. *Id*.

Consumers admitted that the 1,000-gallon catch basin had been located at the Facility since at least December 31, 1995. *See* Answer ¶ 38. Consumers also admitted that it received 55-gallon drums from customers who were discarding them as scrap metal. *Id.* ¶¶ 47-49. Apart from being scrap themselves, the drums contained metal scraps, such as aluminum turnings and rod brass turnings, *see* C Ex 10 at Resp. 7, that were coated with cutting oil.[11] *See* Answer ¶¶ 47-49. The 55-gallon drums were transported from the customer to Consumers via truck. *See* C Exs 1, 11.

Consumers also admitted that its practice was to place the 55-gallon drums on a screen above the catch basin, and punch holes in the drums for the purpose of separating the cutting oil from the metal turnings. Answer ¶ 50; C Ex 11. Consumers allowed the cutting oil from the drums to empty into the catch basin until the free flow of the liquid from the drums abated, which took anywhere from one hour to overnight. Answer ¶ 51; C Ex 11 at Resp. 4c; C Ex 20. The used oil collected in the catch basin was then picked up by a re-refiner, Safety-Kleen.[12] Because Safety-Kleen's re-refining process requires oil that is free of solid contents, such as metal scraps, and because Safety-Kleen cannot pump

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[11] Cutting oil is used to cool or lubricate metal working tools and the metal being worked. C Ex 20 ¶ 8. Cutting oil is composed of a base stock oil and customer-specified additive chemicals designed for the particular application or process. *Id*. After use, cutting oils may sometimes contain arsenic, barium, cadmium, chromium, lead, and benzo fluoranthene. *Id*.

[12] Safety-Kleen collects used oil from its customers and transports it to one of its re-refineries. C Ex 20 ¶ 6. Safety-Kleen re-refines used oil to produce a variety of commercial and industrial products including, but not limited to, lubricating oil base stock, asphalt roofing feedstock, and industrial fuels. *Id*.

used oil containing solid contents into its vehicles, its customers – such as Consumers – must physically separate the solid contents from the used oil. C Ex 20 ¶ 6.

Consumers asserted that between June 15, 1999, and April 1, 2001, it collected only 1,647 gallons of used oil in the catch basin *See* C Exs 20, 21. Consumers also asserted that during this period it arranged with Safety-Kleen to pick up four separate loads of this used oil. Answer ¶¶ 52-53; C Ex 11. Region V, however, alleged that Consumers did not accurately report the volumes and shipments of used oil it collected in the catch basin. Specifically, Region V alleges, based on information obtained from Safety-Kleen, that Consumers sent an additional ten shipments of used oil to Safety-Kleen between June 15, 1999, and April 1, 2001. *See* C Ex 21. Moreover, the Region alleges that Safety-Kleen collected a total of 6,048 gallons – not 1,647 gallons – of used oil from Consumers between June 15, 1999, and April 1, 2001. *See* C Ex 20.

It is undisputed that, during the relevant time frame, Consumers did not possess an EPA identification number and had not submitted to either EPA or the Michigan Department of Environmental Quality ("MDEQ"), an EPA Notification of Hazardous Waste Activity Form or letter regarding such notification. *See* Answer ¶ 56; C Ex 20 ¶ 5. It is further undisputed that from at least June 1, 1999, to February 28, 2001, Consumers did not have a written plan for the analysis of used oil or a record of used oil and analyses performed, and did not analyze for the total halogen content of the used oil it received. *See* Answer ¶¶ 57-61; C Ex 11 at Resp. 14.

C. *Procedural Background*

On February 15, 2001, Region V filed a Complaint against Consumers alleging violations of the regulations governing the proper disposal of refrigerant under CAA § 608, 42 U.S.C. § 7671g, and the regulations requiring the preparation and implementation of a spill prevention and countermeasures control ("SPCC") plan under CWA

§ 311, 33 U.S.C. § 1321.[13] The Region filed its First Amended Complaint on March 30, 2001, in which it added allegations of violations of the regulations implementing the Michigan Administrative Code's and RCRA's requirement to prepare a Waste Analysis Plan, and the Michigan Administrative Code's requirement to provide notification of its status as a used oil processor or re-refiner.[14] *See* RCRA §§ 3008(a), 3010, 42 U.S.C. §§ 6928(a), 6930; Mich. Admin. Code r. 299.9813 (3) and (7). The Region proposed the assessment of a total civil penalty of $223,170.[15]

On April 23, 2001, Consumers filed its Answer. With respect to the alleged CAA violations, Consumers admitted that it receives and segregates scrap metal, but averred that it has a policy of not buying or

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[13] The ALJ granted Region V's motion for accelerated decision with respect to the CWA violations and, therefore, those violations are not the subject of Region V's Appeal. *See* Accelerated Decision, 2002 WL 598836, at *16.

[14] Count I alleged that Consumers violated 40 C.F.R. § 82.156(f) by failing to either recover refrigerant (CFCs or other ozone-depleting substances) or verify that refrigerant had been evacuated, prior to disposing of refrigeration and air conditioning units or parts.

Count II alleged that Consumers failed to maintain records of verification of refrigerant evacuation in violation of 40 C.F.R. § 82.166(i), and failed to maintain those records for a minimum of three years as required by 40 C.F.R. § 82.166(m).

Count III alleged that Consumers failed to have a SPCC Plan in violation of 40 C.F.R. § 112.3(b).

Count IV alleged that Consumers failed to submit to the Michigan Department of Environmental Quality or to the EPA, a notification form containing an EPA identification number in violation of Mich. Admin. Code r. 299.9813(3) and (7) and 40 C.F.R. § 279.51.

Count V alleged that Consumers failed to prepare a waste analysis plan in violation of Mich. Admin. Code r. 299.9813(3) and (7), and 40 C.F.R. § 279.55.

[15] The Region proposed a civil penalty of $93,500 for Count I, $93,500 for Count II, $15,270 for Count III, $10,450 for Count IV, and $10,450 for Count V. *See* Amended Complaint at 19-28.

accepting any appliances containing refrigerant and, to the extent that such appliances were accepted, they were previously tagged to indicate that the refrigerant had been drained from the appliance. With respect to the alleged RCRA violations, Consumers admitted that it maintains a 1,000 gallon drum catch basin at the Facility, which it uses to collect used oil drained from 55-gallon drums containing scrap metal. However, Consumers asserted that it was not required to submit notification of used oil processing activities, because it is a used oil generator, rather than a used oil processor and, as such, is not subject to the used oil processor requirements. Finally, with respect to the CWA violations, Consumers admitted that it did not have a SPCC Plan or a written waste analysis plan.[16]

On April 11, 2002, the ALJ issued his Accelerated Decision in which he: (1) merged Counts I and II and denied accelerated decision as to these counts; (2) granted accelerated decision as to Count III; and (3) dismissed with prejudice Counts IV and V of the Amended Complaint. The ALJ based his merger of Counts I and II on the premise that Consumers "cannot be charged with two separate violations of 40 C.F.R. § 82.156(f) and 40 C.F.R. §§ 82.166(i) and (m)." *See* Accelerated Decision, 2002 WL 598836, at *14. In addition, the ALJ dismissed with prejudice Counts IV and V based on his determination that a person who receives used oil from off-site suppliers, drains it by gravity separation, and then collects and mixes it with other used oil at its facility, is not a processor of used oil and, thus, is not subject to the used oil processor requirements. *Id*. at *21-23.

On April 29, 2002, Region V submitted to the ALJ a request for certification for interlocutory review, which the ALJ denied based on his assessment that Region V failed to meet the criteria for review at 40 C.F.R. § 22.29(b). *See* Interlocutory Order, 2002 WL 2005522.

By motion dated September 3, 2002, Region V requested an extension of time to file a Notice of Appeal and accompanying brief appealing the Accelerated Decision and Interlocutory Order, *see* Motion

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[16] *See supra* note 13.

for Extension of Time (Sept. 3, 2002), which was granted by the Board. *See* Order Granting Motion for Extension of Time to File Notice of Appeal (EAB, Sept. 5, 2002). On October 7, 2002, Region V filed its request for interlocutory review of the ALJ's Accelerated Decision and Interlocutory Order, *see* Motion and Memorandum In Support of Complainant's Request for Interlocutory Review (Oct. 7, 2002), which the Board granted. *See* Order Granting Request for Interlocutory Review (EAB, Jan. 22, 2003).

II. *DISCUSSION*

We now turn to the issues presented on appeal. In section II.A, we address the merger of Counts I and II, the standard of proof and production for an accelerated decision, and the ALJ's denial of Region V's motion for accelerated decision with respect to Counts I and II. In section II.B, we discuss the ALJ's denial of Region V's motion for accelerated decision with respect to Counts IV and V, as well as their dismissal with prejudice. The Board generally reviews the ALJ's factual and legal conclusions on a *de novo* basis. *See* 40 C.F.R. § 22.30(f).

A. *CAA Violations: Counts I and II*

1. *The ALJ's Merger of Counts I and II of Region V's Amended Complaint*

Counts I and II of the Region's Amended Complaint alleged that Consumers violated the regulations at 40 C.F.R. §§ 82.156 and 82.166. *See* Amended Complaint at 12-14. Specifically, in Count I of the Amended Complaint, which was entitled "Failure to properly recover or obtain verification statements for proper evacuation of ozone depleting refrigerants," Region V alleged that Consumers violated 40 C.F.R. § 82.156(f) by failing to either recover refrigerant or verify that refrigerant had been evacuated, prior to disposing of refrigeration and air conditioning units or parts. *See id.* at 12-13.

Based on Consumers' statements – made both during and after the July 15, 1999 inspection – that it did not recover refrigerant itself but, rather, relied on visual observations of the appliances for refrigerant

and/or certification tags, the Region determined that Consumers chose to verify refrigerant evacuation. Accordingly, the Region determined that Consumers was required – but failed – to maintain records of that verification. Thus, Count II of Region V's Amended Complaint, entitled "Failure to retain records relative to the proper evacuation of ozone depleting refrigerants," alleged that Consumers violated 40 C.F.R. § 82.166(i) by failing to maintain records of written verification statements of refrigerant evacuation. *See id.* at 13-14. Count II also charged Consumers with a violation of 40 C.F.R. § 82.166(m) for failing to maintain those records for a minimum of three years. *See id.* at 14.

The ALJ merged Counts I and II of the Amended Complaint, ruling that Consumers cannot be charged with both a failure to obtain verification of refrigerant evacuation and a failure to maintain records of that verification. Specifically, the ALJ reasoned that since he interprets section 608(b) of the CAA as directing the Agency to promulgate regulations addressing "each appliance," the appropriate unit of violation[17] is on a "per appliance" basis and, therefore, the Agency may not enforce against more than one violation with respect to the same appliance. Thus, the ALJ ruled that "the record-keeping requirements of section 82.166(m) are triggered by, and are completely dependent upon, compliance with section 82.156(f)(2)." *See* Accelerated Decision, 2002 WL 598836, at *12.

Region V argues on appeal that merging the violations alleged in Counts I and II would thwart the intent of both Congress and the Agency to prohibit the venting or release of certain CFCs to the atmosphere, would frustrate the Agency's efforts to enforce the ozone protection program, and would be inconsistent with the so-called *Blockburger* standard established by the United States Supreme Court. *See* Appeal Brief at 34; *see also Blockburger v. United States*, 284 U.S. 299 (1932) (holding that where the same act or transaction constitutes a

[17] The "unit of violation" is the civil or, in this context, the administrative counterpart of the criminal "unit of prosecution," which refers to how many different instances of a given offense the defendant behavior exemplifies. *See In re Microban Prods. Co.*, 9 E.A.D. 674, 683 (EAB 2001) (citing Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 Cal. L. Rev. 335, 355 (2000)).

violation of two distinct statutory provisions, the standard to be applied when determining whether there are two offenses, or only one, is whether each provision requires proof of an additional fact that the other does not).

As we have observed in the past, the *Blockburger* standard applies only to merger questions involving two distinct statutory provisions. *See McLaughlin Gormley King Co.*, 6 E.A.D. 339, 345 n.7 (EAB 1996); *see also Sanabria v. United States*, 437 U.S. 54, 70 (1978) ("Because only a single violation of a single statute is at issue here, we do not analyze this case under the so-called "same evidence" test, which is frequently used to determine whether a single transaction may give rise to separate prosecutions, convictions, and/or punishments under separate statutes."); *United States v. Wood*, 568 F.2d 509, 513 n.1 (6th Cir. 1978), *cert. denied*, 435 U.S. 972 (1978) ("Here we are not concerned with whether a single act violates a multiplicity of statutes as in * * * *Blockburger*. Rather, we face what the Supreme Court has recognized to be a different issue: whether a course of conduct * * * can result in multiple violations of the same statute."). However, in the case at hand, Consumers is charged with violating regulatory requirements that are derived from a *single statutory provision*. Therefore, the *Blockburger* standard is not applicable to this case. *Id*.

Blockburger notwithstanding, we turn to the plain language of the regulations to determine whether the ALJ erred in precluding the Region from penalizing Consumers for violations of both section 82.156(f) and section 82.166(i) and (m) based on the circumstances at hand. As discussed below, we, like the ALJ below, conclude that Consumers cannot be penalized under both section 82.156(f) and section 82.166(i) and (m), although our reasons for so concluding are somewhat different from those articulated in the Accelerated Decision.

Significantly, the record-keeping requirements in section 82.166 apply to "statements *obtained* pursuant to § 82.156(f)(2)." Thus, the record-keeping requirements presuppose the existence of a valid record in the first instance. As discussed in section II.A.2.a.ii, below, Consumers did not *obtain* any valid section 82.156(f)(2) records. Indeed, Count I of the Amended Complaint is styled as "Failure *to recover or*

obtain verification statements * * * ." Amended Complaint at 12-13 (emphasis added). Because no valid verification statements were obtained in the first instance, and because the record-keeping requirements pertain only to records actually "obtained," section 82.166 is simply inapplicable under these circumstances.[18]

Contrary to the Region's suggestion, we do not regard this outcome as inconsistent with the Congressional directive in the CAA that violators be penalized on a "per requirement" basis. *See* CAA § 113(a), (d)(1), 42 U.S.C. § 7413(a), (d)(1). We simply see a rational dichotomy under the regulations that treats the failure to obtain records as a violation of section 82.156(f), and a failure to maintain records once obtained as a violation under section 82.166. Accordingly, we decline to overturn the ALJ's decision not to penalize Consumers for violations of both section 82.156(f) and section 82.166(i) and (m), although our reasoning turns not on a merger theory, but rather because, at least under the circumstances at hand, the regulations at issue are mutually exclusive.[19]

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[18] Because the Region bears the burden of proving each of the elements of its claim, it was incumbent upon the Region to prove that records were obtained in the first instance. Here, where the parties agree that the opposite was true, the Region necessarily failed in meeting its burden of proof under this Count.

[19] While we do not need to resolve the question whether there could ever be a circumstance in which section 82.156(f) and section 82.166(i) and (m) could both be simultaneously penalized, we note that it is difficult for us to foresee such a circumstance. If a regulatee fails to obtain valid records in the first instance, then the regulatee is appropriately penalized under section 82.156(f). If the regulatee obtains valid records in the first instance, and thus complies with section 82.156(f), but fails to maintain them, then the regulatee is appropriately penalized not under section 82.156(f), but rather under section 82.166(i) and (m). This being said, because, as evidenced by this case, there can be circumstances in which the question of whether valid records were obtained in the first instance is in dispute, a Region is at liberty to charge and seek to prove violations of section 82.156(f) and section 82.166(i) and (m) in the alternative. In this sense, the ALJ's treatment of the claims as "merged" strikes us as technically incorrect. Nonetheless, we agree with his conclusion that ultimately a penalty should be assessed under one, but not both, of these regulatory provisions.

2. *ALJ's Denial of Region V's Motion for Accelerated Decision on CAA Counts*

a. *Evidentiary Standard of Proof and Production for an Accelerated Decision*

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. part 22 ("CROP"), which governs this proceeding, explains the standard for granting an accelerated decision as follows:

> The [ALJ] may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20 (2003).

As we have said in previous decisions, although the Federal Rules of Civil Procedure do not apply to the proceedings before us, we look to the Federal Rules, including the summary judgment standard in Rule 56, for guidance. *In re BWX Tech., Inc.*, 9 E.A.D. 61, 74 (EAB 2000); *see also In re Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999) (the standard for granting an accelerated decision is "similar to the summary judgment standard set forth in Rule 56"); *In re Mayaguez Reg'l Sewage Treatment Plant,* 4 E.A.D. 772, 788-82 (EAB 1993) (following Rule 56 to reject respondent's request for evidentiary hearing on NPDES permit denial because respondent failed to raise any genuine issues of material fact); *In re Newell Recycling Co.,* 8 E.A.D. 598, 613 n.14 (EAB, 1999) (citing Rule 56 as guidance in rejecting respondent's request for evidentiary hearing on TSCA penalties).

Under Rule 56, a party must demonstrate that an issue is both "material" and "genuine" to defeat an adversary's motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1985). A factual dispute is material where, under the governing law, it might

affect the outcome of the proceeding. Whether an issue is "genuine" hinges on whether a jury or other fact-finder could reasonably find for the nonmoving party. If the evidence viewed in the light most favorable to the nonmoving party is such that no reasonable decision-maker could find for the nonmoving party, summary judgment is appropriate. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59 (1970).

Motions for accelerated decision before ALJs are evaluated according to comparable considerations. *See, e.g., BWX Tech.,* 9 E.A.D. at 75 n.19 (citing *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-24 (5th Cir. 1978)). As the Board has observed, "in deciding whether a genuine factual issue exists, the judge must consider whether the quantum and quality of evidence is such that a finder of fact could reasonably find for the party producing that evidence under the applicable standard of proof." *Mayaguez,* 4 E.A.D. at 781 (citing *Anderson,* 477 U.S. at 252). In a civil matter, such as the case at hand, the applicable standard of proof is a preponderance of the evidence. *See* 40 C.F.R. § 22.24 ("Each matter of controversy [governed by the CROP] shall be decided by the [ALJ] upon a preponderance of the evidence.").[20]

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[20] We have described the burden of proof in this context as follows:

> The movant assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor. If the movant has the burden of persuasion at trial, the movant must present evidence that is so strong and persuasive that no reasonable jury is free to disregard it, and that entitles the movant to a judgment in his favor as a matter of law.
>
> In contrast, the summary judgment movant who does not carry the burden of persuasion on this issue at trial has the lesser burden of "showing" or "pointing out" to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue and that the movant is entitled to judgment in its favor as a matter of law. Once this showing has been made, the burden of production shifts to the nonmovant having the burden of persuasion. The nonmovant's burden of production in these circumstances is considerably more demanding than the movant's with respect to the issues upon which the nonmovant bears

(continued...)

Nevertheless, as the United States Supreme Court has noted, trial courts should not grant summary judgment until the record has been sufficiently developed to allow the exploration of facts critical for the resolution of the issues. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 296 (1986) ("The haste with which the District Court granted summary judgment to respondents, without seeking to develop the factual allegations contained in respondents' brief, prevented the full exploration of the facts that are now critical to resolution of the important issue before us. * * * [T]he District Court should have the opportunity to develop a factual record adequate to resolve the serious issues raised by the case.").

For the reasons discussed below, we decline to disturb the ALJ's denial of Region V's motion for accelerated decision with respect to the CAA counts, but reverse his subsidiary ruling that, as a matter of law,

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[20](...continued)

> the burden of persuasion at trial. This burden of production requires the nonmovant to identify specific facts (with or without affidavits) from which a reasonable factfinder, applying the appropriate evidentiary standard (i.e., a preponderance of the evidence here), could find in its favor on each essential element of its claim.
>
> As a corollary of the foregoing, parties opposing summary judgment must provide more than a scintilla of evidence on a disputed factual issue to show their entitlement to a trial or evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case. In considering whether a nonmovant has met this standard, courts are not supposed to engage in the jury function of determining credibility or weighing facts; instead, courts are to view the record in the case and submissions in the light most favorable to the nonmovant (including the nonmovant who bears the burden of persuasion on an issue), and are to believe all evidence offered by it. However, this indulgent standard of review does not require courts to find a genuine dispute and deny summary judgment where evidence is legally insufficient to support an essential element of a case or not significantly probative.

In re BWX Techs., Inc., 9 E.A.D. 61, 76 (EAB 2000) (citations omitted).

RSI's certification tags and ESS' contract satisfy the requirements of 40 C.F.R. § 82.156(f)(2).

i. *The ALJ's Decision to Allow for a Complete Development of the Record Was Not Erroneous*

The ALJ denied Region V's motion for accelerated decision on liability with respect to Count I because he determined that the record was not completely developed on this issue. Specifically, the ALJ identified the following issues of material fact in need of further examination: (1) whether Consumers had disposed of the small appliances observed during the July 15, 1999 inspection; (2) whether Consumers retrieved for use the refrigerators observed during the July 15, 1999 inspection; and (3) whether Consumers temporarily stored other small appliances containing refrigerant and made arrangements for the refrigerant to be properly drained. *See* Accelerated Decision, 2002 WL 598836, *8-10.

Region V based its motion for accelerated decision on evidence contained in Consumers' Answer to the Complaint, the declarations of the Region's inspectors, and responses to the Region's request for information from Consumers, ESS, and RSI. However, as the ALJ noted in the Accelerated Decision, Consumers proposed to offer the testimony of its plant supervisor, Maynard Blach, and its president, Norbert Wierszewski, in support of Consumers' assertion that refrigerators containing refrigerant were set aside for the personal use of Consumers' employees. *See id.* at *8. In addition, the ALJ noted that while the evidence creates an inference that the appliances observed by Mr. Cardile had already been discarded, further evidence adduced at the evidentiary hearing could establish that these appliances had not yet been discarded and were awaiting verification of refrigerant removal. *Id.* at *9-10.

While an evidentiary hearing may well lead to the conclusion that Consumers' arguments on these points cannot prevail, we are not prepared at this juncture to conclude that they are so clearly neither genuine nor material as to warrant reversing the ALJ's decision to allow them to be developed further through an evidentiary hearing.

Accordingly, we uphold the ALJ's denial of Region V's motion for summary judgment as to Count I.

ii. *The ALJ Erred in Ruling as a Matter of Law That RSI's Certification Tags and ESS' Contract Were Valid Verifications Under 40 C.F.R. § 82.156(f)(2)*

In the course of ruling there were genuine issues of material fact precluding him from granting Region V's motion for accelerated decision, the ALJ held that as a matter of law the tags used by RSI to certify refrigerant recovery, and the November 17, 2000 letter that Consumers asserts is a contract for ESS' recovery of refrigerant, contain the requisite elements required by section 82.156(f)(2). Region V challenges this ruling, asserting that neither RSI's certification tags nor the November 17, 2000 letter satisfy the requirements of 40 C.F.R. § 82.156(f)(2) because they fail to contain the language required by section 82.156(f)(2). Further, Region V argues that the November 17, 2000 letter, inasmuch as it was not obtained prior to delivery of the appliances at issue, is not a valid contract within the meaning of section 82.156(f)(2).

Section 82.256(f)(2) specifies that when a person taking the final act in the disposal process chooses to verify refrigerant evacuation, that verification must include the following elements:

> a signed statement from the person from whom the appliance or shipment of appliances is obtained that all refrigerant that had not leaked previously has been recovered from the appliance or shipment of appliances in accordance with paragraph (g)[21] or (h) of this section, as applicable. This statement must include the name and address of the person who recovered the refrigerant and the date the refrigerant was recovered or

[21] Because this case deals with refrigerators and window air conditioners, section 82.156(g) does not apply. *See* 40 C.F.R. § 82.156(g).

> a contract that refrigerant will be removed prior to delivery.

40 C.F.R. § 82.256(f)(2). By its terms, the regulation contemplates that all verifications include: (1) a signed statement (as opposed to verbal assurances); (2) from the person from whom the appliance or shipment of appliances is obtained; (3) that all refrigerant that had not leaked previously has been recovered from the appliance or shipment of appliances in accordance with regulatory requirements; (4) the name of the person who recovered the refrigerant; (5) the address of the person who recovered the refrigerant; and (6) the date the refrigerant was recovered.

As we observed earlier, we are without the benefit of a completed RSI tag in this case.[22] We do, however, have as part of the record a copy of a blank tag customarily used by RSI. RSI's blank tag contained the following text:

> CERTIFICATION
>
> FREON_____RECOVERED
> ___/___/___ _____
> DATE LICENSE NO.
> TECHNICIAN_____
>
> REFRIGERATION SERVICE, INC.
> 11111 Grand River Ave., Detroit, MI 48204

See C Ex 16. As can be seen, even if properly completed, RSI's tag fails to contain at least one very important element required by the plain language of section 82.156(f)(2): it fails to either expressly state, or contain language that would demonstrate, that all refrigerant that had not leaked previously has been recovered from the appliance or shipment of appliances in accordance with the regulations, including, most

[22] *See supra* note 8.

importantly, the requirement in section 82.156(h) that persons recovering the refrigerant from small appliances recover either 90 percent of the refrigerant in the appliance when the compressor is operating or 80 percent of the refrigerant in the appliance when the appliance is not operating, or evacuate the small appliance to four inches of mercury vacuum. Given the plain language of the regulation, and the Agency's expressly stated goal of requiring that final disposers who choose the verification option ensure that refrigerant recovery is done in accordance with the applicable performance standards, *see* 58 Fed. Reg. 28,660, 28,704 (May 14, 1993), we do not consider this omission insignificant.

Even assuming *arguendo* that the Agency did not intend for written verification statements to contain the exact language contained in section 82.156(f)(2), but, rather, simply required information sufficient to establish that refrigerant was recovered in accordance with section 82.156(g) or (h), RSI's tag would still be insufficient. An indication of how much freon[23] was recovered, without more, does not establish, for example, whether that quantity represents the required "90 percent of the refrigerant in the appliance when the compressor is operating, or 80 percent of the refrigerant in the appliance when the appliance is not operating." Moreover, some refrigerator and air conditioning units contain freon substitutes[24] and, because RSI's tag references only freon, it would not, without modification, be suitable for freon-substitute units, notwithstanding the fact that these units are clearly covered by the verification requirements. Accordingly, we reverse the ALJ's ruling that these tags were, as a matter of law, sufficient substitutes for the certification statement required by section 82.156(f)(2). *See* Accelerated Decision, 2002 WL 598836, at *10; *see also* Interlocutory Order, 2002 WL 2005522, at *31-32.

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[23] Freon is a trade name for CFC and hydrochlorofluorocarbon refrigerants sold by E.I. du Pont de Nemours and Company. Other trade names include Allied Signal, Inc.'s "Genetron" and Imperial Chemical Industries' "Arcton." *See* http://www.epa.gov/Ozone/snap/refrigerants/qa.html#q01.

[24] *See, e.g.,* "Substitute Refrigerants Under SNAP [Significant New Alternatives Policy] as of February 6, 2002," EPA, Air and Radiation Stratospheric Protection Division, http://www.epa.gov/Ozone/snap/refrigerants/reflist.pdf.

Similarly, ESS' November 17, 2000 letter, which Consumers offers as a verification contract for refrigerant evacuation for the 1,665 window air conditioners supplied by ESS, fails on its face to meet the standard for verification contained in section 82.156(f)(2) in two respects. First, the November 17, 2000 letter is dated *after* the date of delivery of the air conditioners at issue, which occurred between August 17, 2000 and September 2000. *See* C Ex 3 at Resp. 6; C Exs 1, 3, at Attachments. The plain language of the regulations requires that the person providing the appliances pledge that refrigerant will be removed prior to delivery. *See* 40 C.F.R. § 82.156(f)(2) ("This [verification] statement must include the name and address of the person who recovered the refrigerant * * * or *a contract* that refrigerant *will be* removed *prior to delivery*.") (emphasis added). Thus, as this certification was not obtained prior to delivery of the appliances at issue, it is clear that the November 17, 2000 letter does not, by itself, establish a compliant contract within the meaning of section 82.156(f)(2).

Additionally, on its face, the November 17, 2000 letter does not contain language certifying that all refrigerant that had not leaked previously has been properly recovered from the appliance or shipment of appliances in accordance with the regulations. Specifically, the November 17, 2000 letter provides, in relevant part, as follows:

> Environmental Specialty Services, Inc. certifies that all refrigerant (including but not limited to chlorofluorocarbons (CFCs) and hydrochlorocarbons (HCFCs), as defined in Sec. 608 of the Clean Air Act Amendments and 40 CFR Part 82) that has not leaked previously will be recovered from appliances to be delivered under this contract of sale prior to delivery. Seller further agrees to indemnify and hold Consumers Recycling harmless from any claim, penalty, fine, fee, cost, attorney's fees, or other liability resulting in whole or in part from seller's breach of this certification.

C Exs 1, 3, at Attachments. Accordingly, the letter neither demonstrates ESS' awareness and knowledge of how refrigerant is to be properly recovered, nor does it stand as an assurance to Consumers that the

recovery would be performed in accordance with the applicable standards – an express goal of the verification requirement. *See* 58 Fed. Reg. 28,660, 28,704 (May 14, 1993). Therefore, we reverse the ALJ's ruling that the November 17, 2000 letter establishes the existence of a valid verification contract within the meaning of section 82.156(f)(2).

B. *RCRA Violations*

1. *The ALJ's Erroneous Dismissal of Counts IV and V of the Region's Amended Complaint*

The ALJ dismissed Counts IV and V of the Amended Complaint[25] because the regulations alleged to have been violated in those Counts apply to used oil processors only, and the ALJ determined that Consumers was not regulated as a "processor" under the regulations. As we understand it, the ALJ's reasons for this conclusion were three-fold: (1) that Consumers is a generator, instead of a processor, and was thus not subject to the requirements for processors; (2) that Consumers drained oil from scrap metal drums for the primary purpose of preparing the scrap metal for recycling rather than to process used oil and thus does not satisfy a key regulatory criterion for "processor" designation; and (3) even if Consumers were a processor and not a generator, it was subject to a regulatory exemption for oil "draining" activities. Accelerated Decision, 2002 WL 598836, at *20-23.

As discussed more fully below, we conclude that the ALJ erred in ruling at this stage of the proceeding, and without having developed a complete factual record, that Consumers is a generator rather than a processor of used oil. We further find that the ALJ erred in concluding as a matter of law that the regulatory exemption for draining activities applies without regard to whether Consumers is a used oil generator.

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[25] As noted earlier, Count IV alleged that Consumers failed to submit to the Michigan Department of Environmental Quality or to the EPA, a notification form containing an EPA identification number in violation of 40 C.F.R. § 279.51 and Mich. Admin. Code r. 299.9813(3) and (7). Count V alleged that Consumers failed to prepare a waste analysis plan in violation of 40 C.F.R. § 279.55 and Mich. Admin. Code r. 299.9813(3) and (7). *See* Amended Complaint at 16-19.

2. *Is Consumers a Used Oil "Processor" or "Generator"?*

The distinction between used oil "processors" and "generators" is, in our view, quite significant to the matter at hand since the obligations that the Region alleges Consumers violated attach only to processors. While generators do have certain obligations under the regulations, those obligations do not include the notification and used oil analysis plan requirements to which processors must adhere.

As stated above, the ALJ found that Consumers was not a "processor" based on his conclusions that Consumers was a generator, not a processor, and that, in any event, Consumers' oil draining activities were not for the primary purpose of oil recovery and thus fell outside the reach of the processing regulations. We find that there are factual issues predicate to both of these conclusion which preclude the entry of summary judgment and thus reverse the ALJ and remand the issues for further factual development.

Our starting point on this issue is the Michigan regulatory code.[26] When construing an administrative regulation, the normal tenets of statutory construction are generally applied. *Black & Decker Corp. v. Comm'r*, 986 F.2d 60, 65 (4th Cir. 1993). The plain meaning of words is ordinarily the guide to the definition of a regulatory term. *T.S. v. Bd. of Educ.*, 10 F.3d 87, 89 (2d Cir. 1993). Additionally, the regulation must, of course, be "interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements." *Sec'y of Labor v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990) (quoting *Emery Mining Co. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)).

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[26] In reaching his conclusions, the ALJ puts considerable weight on both the text of and preambular statements regarding the *federal* used oil regulations. As we have observed, the State of Michigan has been fully authorized by EPA to run the used oil program. *See supra* note 1. Accordingly, the critical inquiry is what the *State* regulations contemplate. The federal regulations remain authoritative in Michigan only to the extent that EPA reserved a relevant part of the program, which is not the case here, or in the event that the State regulations incorporate the federal requirements by reference. None of the relevant provisions of the Michigan regulations incorporate their federal counterparts by reference.

Our examination of the Michigan regulations begins with the definition of "used oil" itself. The Michigan regulations define "used oil" as "any oil which has been refined from crude oil, or any synthetic oil, which has been used and which as a result of the use, is contaminated by physical or chemical impurities." Mich. Admin. Code r. 299.9109(p). Apart from this general definition, the regulations go on to list a number of specific items regulated under the used oil rules, several of which hold potential relevance for this case.

> Used oil and the following materials are subject to regulation as used oil * * *, unless otherwise specified in subrule (2) of this rule:
>
> * * * *
>
> (b) A material that contains, or is otherwise contaminated with, used oil and is burned for energy recovery.
>
> (c) Used oil that is drained or removed from materials that contain, or are otherwise contaminated with, used oil.

Mich. Admin. Code r. 299.9809(1).

This provision makes plain that material, such as scrap metal, that is contaminated with used oil, *and* which is to be burned for energy recovery, is regulated as used oil.[27] It also makes plain that used oil that

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[27] With respect to the federal regulations, it appears that the more aggressive regulation focused on energy recovery burning because the Agency was concerned with, among other things, the burning of used oils containing high levels of halogens. *See* 57 Fed. Reg. 41,566, 41,597 (Sept. 10, 1992) ("EPA is concerned about the burning of used oils containing high levels of halogens in uncontrolled burners. Both metalworking oils and used compressor oils that contain a high level of halogenated constituents (>4,000 ppm) can not be burned safely in uncontrolled boilers and furnaces. If such used oils are to be burned for energy recovery, they must be burned at facilities that are in compliance with subpart G of part 279 or, if the used oil has been mixed with hazardous waste, with (continued...)

is drained from contaminated materials is, once drained or removed, treated as regulated used oil.[28] What is left less clear by this provision is the regulatory status of material contaminated by oil which is not to be burned for energy recovery. Indeed, if this text was all we had to work with, it might be read to imply by exclusion that the only oil-contaminated material subject to regulation is that which is destined for energy recovery.

There is, however, another provision that brings further meaning to the equation. Rule 299.9809(2) provides, in relevant part:

> The following materials are not subject to regulation as used oil under the provisions of R. 299.9810 to R. 299.9816, but may be subject to regulation as a hazardous waste under part 111 of the act and these rules:
>
> * * * *
>
> (c) A material that contains, or is are otherwise contaminated with, used oil if the used oil has been properly drained or removed to the extent possible so

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[27](...continued)
subpart H of part 266.").

[28] Based on this second provision, the oil handled at Consumers' facility would, at the very latest, have become subject to regulation at the time Consumers drained the oil from the drums containing oil-laden scrap metal. This does not appear to be in dispute. The oil in the drums is "cutting oil" – an oil that is used to cool or lubricate metal working tools and the metal being worked. C Ex 20 ¶ 8. Cutting oil is composed of a base stock oil and customer-specified additive chemicals designed for the particular application or process, and may contain arsenic, barium, cadmium, chromium, lead, and/or benzo fluoranthene. *Id.* Consumers described this oil as "used oil" in the SPCC Plan it submitted to the Agency. *See* C Ex 5 at 5. Thus, there does not appear to be any question that when Consumers drained the oil into the catch basin the oil was, at least at that point, "used oil" within the meaning of the regulations. But, because we are attempting to discern whether Consumers was the generator of used oil, as opposed to a subsequent processor, the key question before us is whether the drums had already acquired regulated status before Consumers' drained them.

> that visible signs of free-flowing oil do not remain in or on the material and the material is not burned for energy recovery.

Id. Notably, this text addresses the same class of material referenced in section 299.9809(1)(b) – material contaminated with oil to be burned for energy recovery – and it carries with it a clearer implication. This provision would appear to stand for the proposition that material contaminated with used oil, whether or not it is to be burned for energy recovery, is excluded from regulation only if the oil has been removed from it to the extent that it no longer contains "free-flowing oil." An established canon of statutory construction provides that exceptions, such as the exclusionary provisions in rule 299.9809, are to be narrowly construed. *See, e.g.*, *City of Edmonds v. Oxford House, Inc.,* 514 U.S. 725, 731-32 (1995) (narrowly interpreting statutory exception in Fair Housing Act); *Comm'r v. Clark*, 489 U.S. 726, 739 (1989) (explaining that statutory exceptions are to be construed narrowly to preserve the primary operation of the general rule). Accordingly, with respect to the question left pregnant by 299.9809(1) – whether material contaminated with used oil that is not destined for burning for energy recovery is subject to regulation – we find the answer in Rule 299.9809(2). Pursuant to that provision, to the extent that the material is laden with "free-flowing oil," it is subject to regulation.[29] Accordingly, if at the time that Consumers received the scrap metal contaminated with used oil at its facility there was free-flowing oil in the drums, the material would have already acquired the status of regulated used oil.

We turn next to the definitions of "generator" and "processor." A used oil generator is defined by the governing regulations as "any

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[29] Any other conclusion would lead to something of an anomaly, in that material contaminated with used oil, but not destined for energy-recovery burning, would be free from regulation without regard to its used oil content. Thus, containers carrying a large proportion of used oil could evade regulation, allowing for a large potential universe of unregulated used oil – a result difficult to reconcile with the goals of the program. *See* 42 U.S.C. § 6901a ("[U]sed oil constitutes a threat to public health and the environment when reused or disposed of improperly [and therefore] it is in the national interest to recycle used oil in a manner which does not constitute a threat to public health and the environment and which conserves energy and materials.").

person, by site, whose act or process produces used oil or whose act *first* causes the used oil to become subject to regulation." Mich. Admin. Code r. 299.9109 (x) (emphasis added); *cf.* 40 C.F.R. § 279.1, .20(a). This would suggest that, ordinarily, generators are distinguished from other entities by the fact that they produce the material that first invokes regulatory coverage. Subsequent handlers may be otherwise regulated, but not as generators of that material.[30]

Consumers' status as generator necessarily turns on whether it took the action that first invoked regulatory coverage, in which case it would be a generator, or whether its suppliers instead took such action. Recalling the definition of regulated used oil discussed above, and considering the particular circumstances of this case, the inquiry narrows to a central question: did the drums that Consumers received from suppliers contain, at the time of their receipt, free-flowing oil? If the answer is yes, than the suppliers were the generators of that material, not Consumers. If the answer is no, then the suppliers were likely not regulated at all, and the material would first become subjected to regulation by virtue of Consumers' draining activities.

The question whether the drums of scrap metal contained free-flowing oil strikes us as largely factual, and we are without the benefit of a fully developed factual record on the issue. The Region points out, with some force, that the fact that oil runs from the drums by gravity alone suggests that the oil is "free-flowing." *See* C Ex 20 ¶ 4.D. On the

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[30] The ALJ maintains that there may be more than one generator for a given waste material, but, as pointed out by the Region, this is difficult to reconcile with the limiting language in section 299.9109 (x), which assigns the generator designation exclusively to that entity that *first* causes the used oil to be subject to the regulation. The Region argues that, in view of this limiting language, the only circumstance in which there may be more than one generator for a given material is when more than one entity is involved in the original act of generation. *See* Appeal Brief at 85-87. While this strikes us as the better reading of the regulations, we are also mindful of the fact that the processing of materials regulated as used oil may itself newly generate "used oil" with an identity separate from the original regulated material. Thus, even if it is determined that the scrap metal drums shipped by suppliers to Consumers were regulated as used oil at the time of shipment, this does not foreclose the possibility that Consumers was also a generator, albeit for a different material – the used oil separated from the scrap metal by draining.

other hand, not altogether unpersuasive is the suggestion made by Consumers below and embraced by the ALJ that the extent to which the flow is truly "free" is necessarily dependent on the rate of flow. *See* Consumers Motion for Accelerated Decision at 14-15; Accelerated Decision, 2002 WL 598836, at *22 ("From * * * the uncontested length of time elapsed in draining the oil from the chips, it may be inferred that there was no visible signs of free-flowing oil remaining in or on the metal chips * * * ."). In other words, if a drum takes a long while to drain, there is cause to question whether it is truly "free-flowing," even though it may, by gravity alone, drain out over time.

Rather than attempting to parse this factual issue based on the incomplete record before us, we rather conclude that there are material facts in dispute pertaining to this issue that preclude a decision on summary judgment that Consumers, rather than its suppliers, is the relevant "generator" for purposes of this case. Accordingly, we remand this question to the ALJ for further factual development.

The related question of whether Consumers satisfies the regulatory criteria for a used oil processor must suffer a similar fate. A used oil processor is defined as "a facility that processes used oil." Mich. Admin. Code r. 299.9109(z); *see also* Mich. Admin. Code r. 299.9813(1). "Processing" is defined in turn as:

> [C]hemical or physical operations designed to produce from used oil, or to make used oil more amenable for production of, fuel oils, lubricants, or other used oil-derived products. Processing includes all of the following:
>
> (i) Blending used oil with virgin petroleum products.
>
> (ii) Blending used oils to meet the fuel specifications.
>
> (iii) Filtration.
>
> (iv) Simple distillation.
>
> (v) *Chemical or physical separation.*
>
> (vi) Re-refining.

Mich. Admin. Code r. 299.9106(t) (emphasis added). Given the nature of Consumers' activities, which are geared towards separating oil from scrap metal, the key questions in terms of whether Consumers is a "processor" are: (1) whether Consumers employed a chemical or physical separation process within the meaning the regulations *and* (2) whether those operations were "*designed* to produce, or make used oil more amenable to the production of, fuel oils, lubricants, or other used oil-derived products." *Id.* (emphasis added).

The terms "chemical or physical separation operations" are not defined further by the regulations. Accordingly we will be guided by the plain meaning of these terms. The term "operation" is generally regarded to mean "the performance of a practical work or of something involving the practical application of principles or processes." *See* Merriam-Webster's Collegiate Dictionary 815 (10th ed. 1999). "Separation" is defined as "the act or process of separating," and "to separate" is defined as "to isolate from a mixture." *Id*. at 1067. "Chemical" is defined as "acting or operated or produced by chemical means," *id.* at 196, and "physical" is defined as "characterized or produced by the forces and operations of physics," *id*. at 877. Based on the plain meaning of these terms, it is apparent that Consumers' practice of receiving drums containing metal chips/turnings and used oil from off-site suppliers, punching holes in the 55-gallon drums, placing them on a screen above the catch basin, separating the used oil from the metal turnings through gravity separation, and collecting this used oil in the catch basin for Safety-Kleen qualifies as "physical separation operations."

We turn now to the second step of the analysis – examining the "design" of Consumers' used oil activities. As an interpretive matter, we note that the ALJ, recognizing that an activity may have more than one function, viewed the regulatory language as calling for identification of the "primary" purpose of the activity. *See* Accelerated Decision, 2002 WL 598836, at *21. Under this interpretation, if the primary purpose of Consumers' oil draining activity was to facilitate scrap metal recycling, then the recovery of used oil would not, as a "secondary" purpose, give rise to used oil processor status.

The Region vigorously opposes the ALJ's "primary purpose" test as introducing a subjective element to regulatory coverage determinations.[31] According to the Region, rather than calling for consideration of an entity's intent or state of mind, the test is simply whether the activity in question has the outcome of making used oil more amenable for the production of used oil-derived products. Appeal Brief at 72-73. The Region further argues that there is no requirement that a purpose be predominant or primary to give rise to regulation. *Id*. at 73-74.

Fundamentally, the question presented turns on the meaning of the term "designed" in the regulatory text. In the absence of any further effort in the regulations themselves to give this term a further and particularized meaning, we consult its plain meaning. The definitions of the verb "design" that most closely speaks to the application at hand is: "to devise for a specific function or end" or "to have as a purpose." Merriam-Webster's Collegiate Dictionary 313 (10th ed. 1999). This definition suggests some problems with both the ALJ's interpretation and the Region's suggested alternative. For example, we find nothing in the definition that compels the ALJ's notion that, to be by design, an

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[31] The preamble language upon which the Region relies provides, in relevant part, as follows:

> The definition of a used oil processor is based on the purpose for which used oil is being filtered, separated, or otherwise reconditioned (i.e., whether the activity is designed to produce used oil derived products or to make used oil more amenable for the production of used oil derived products). The Agency is concerned that in situations where used oil is being filtered, separated or otherwise reconditioned and then sent to off-site burners, the purpose of the activity may prove difficult to discern and that consequently, § 279.20(b)(2)(ii) provisions may be used as a means to avoid compliance with the used oil processor standards (i.e., by persons who claim not to be used oil processors under the §279.20(b)(2)(ii) provisions but whose primary purpose is to make the used oil more suitable for burning). *Therefore, EPA believes it is necessary to adopt an objective measure of the purpose of the activity.*

See 59 Fed. Reg. 10,550, 10,556 (Mar. 4, 1994) (emphasis added).

outcome needs to have been the *primary* reason for doing a thing. The definition fairly plainly leaves the space for an activity to have been designed to accomplish more than one purpose. Thus, an important secondary objective could, notwithstanding its secondary status, be something that an undertaking was nonetheless designed to achieve.

The weakness in the Region's interpretation is that it omits altogether the notion of purposefulness that is embodied in the dictionary definition. Apparently, in the Region's view, an outcome that is entirely coincidental and not contemplated could nonetheless be part of a project's design. This strikes us as stretching the term too far.

In our view, a proper interpretation of the term "designed" must both preserve the notion of purposefulness inherent in its plain meaning and not limit its reach to the *primary* purpose of an activity. Apart from the primary purpose, other significant secondary purposes can also be part of the design of an undertaking. Whether an outcome is merely coincidental or part of the purpose of an undertaking will turn on a range of factual considerations that should, in our view, be further examined before an attempt to answer this question is made. Although by no means an exclusive list, questions that strike us as potentially relevant to the inquiry include the following:

> 1. Is recovery of used oil of some economic importance to Consumers?
>
> 2. Is the draining of the used oil in fact necessary to allow for the processing of the scrap metal in the drums?
>
> 3. Does the draining facilitate in a meaningful way the recycling of scrap metal?
>
> 4. Is there evidence that the desire to facilitate recovery of used oil influenced either the decision to construct the

> drum draining apparatus or the design of that apparatus?[32]
>
> 5. Could Consumers have disposed of its used oil through other means?

Because we regard the record as incomplete on this issue, we conclude that the ALJ disposed of it prematurely. Accordingly, we remand the question of whether Consumers is a "processor" within the meaning of the regulations to the ALJ for further proceedings consistent with this decision.

3. *ALJ's Erroneous Interpretation of the Exemption for "Draining"*

The ALJ ruled that the applicable rules exempt "draining" activities by processors generally and that, accordingly, even if Consumers is a processor, its drum draining operations are exempt from regulation. We find that the ALJ erred in so ruling.

Significantly, the Michigan regulations do not on their face generally exempt from processing requirements those processors which are engaged in draining activities. Rather, the regulations purport to exempt only a narrow class of entities: those entities which are generators but which also engage in certain processing activities (e.g., draining) on-site. Specifically, the regulations provide, in relevant part, as follows:

> (c) A used oil generator who performs any of the following activities is not a processor if the used oil is generated on-site and is not being sent off-site to a burner of specification or off-specification used oil fuel:
>
> * * * *

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[32] While we are sensitive to the Region's concern that regulatory coverage questions not devolve to formless inquires into the subjective, we do not see our approach as leading to such a result. Rather, it looks to objective manifestations of purpose.

> (iv) Draining or otherwise removing used oil from materials that contain, or are otherwise contaminated with, used oil to remove excessive oil to the extent possible pursuant to the provisions of R. 299.9809(2)(c).

Mich. Admin. Code r. 299.9813(c)(iv).[33]

As we have already observed, it is premature at this stage of this proceeding to determine Consumers's status as a generator. Accordingly, it is likewise not possible at this stage to determine whether Consumers falls within the scope of the express terms of the exemption.[34]

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[33] A comparable provision can be found in the federal rules. *See* 40 C.F.R. § 279.1; *see also* 59 Fed. Reg. 10,550, 10,555 (Mar. 4, 1994). Specifically, section 279.20(b)(2) (Standards for Used Oil Generators - Applicability) provides, in pertinent part:

> Except as provided in paragraph (b)(2)(ii) of this section, generators who process or re-refine used oil must also comply with subpart F [Standards for Used Oil Processors and Re-Refiners] of this part.
>
> (ii) Generators who perform the following activities are not processors provided that the used oil is generated on-site and is not being sent off-site to a burner of on- or off-specification used oil fuel.
>
> * * * *
>
> (D) Draining or otherwise removing used oil from materials containing or otherwise contaminated with used oil in order to remove excessive oil to the extent possible pursuant to § 279.10(c)[.]

40 C.F.R. § 279.1.

[34] It bears mention that, as the party seeking to invoke the exemption, Consumers bears the burden of proof on this issue. *See In re Rybond*, 6 E.A.D. 614, 637 n.33 (EAB 1996) (holding that a party seeking to invoke an exception bears the burden of persuasion and production).

Our analysis does not end there, however, as the ALJ concluded, essentially, that the exemption applies to processors generally – not just to those processors which are also on-site generators. Specifically, the ALJ offered the following analysis:

> The regulatory definition of "processing," and in particular, the listed example of "physical separation," could encompass the act of draining oil from other materials. However, the term "draining" does not appear in the definition of "processing," but does appear in the regulatory provisions defining the scope of used oil generators *vis a vis* processors.
>
> * * * *
>
> It may be presumed from these explicit references to "drainage" in defining generators of used oil, that the neighboring definition of "processing," which has no reference to drainage, was intended to exclude drainage.

Accelerated Decision, 2002 WL 598836, at *26-28 (citations omitted). We find that well-established canons of construction guide us toward a contrary interpretation.

First, ordinarily the presence of a term in one provision that is absent from another signifies a conscious choice by the framer to limit the term to the setting in which it is employed. *See, e.g., Rusello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). We see no reason to presuppose otherwise in this setting.[35] Moreover, as

[35] Indeed, we find indications that in developing its RCRA regulatory program, EPA generally sought to encourage, by means of diminished regulation, certain on-site activities by generators in order to decrease the amount of waste requiring transportation on public highways. *See* 45 Fed. Reg. 12,722, 12,723 (Feb. 16, 1980) (relating to 40 (continued...)

a general proposition, exemptions like the provision before us are to be narrowly construed. *See Comm'r v. Clark*, 489 U.S. 726, 739 (1989) (statutory exceptions are to be construed narrowly in order to preserve the primary operation of the general rule). By contrast, the ALJ's construction effectively enlarges the class of exempted entities beyond those contemplated by the express terms of the regulation. Further, in so doing, the ALJ's construction effectively reads the language limiting the processing exemption out of the regulation, thus coming into conflict with yet a third canon of construction. *See, e.g., Nat'l Bank of Oregon v. Indep. Ins. Agents of Am.,* 508 U.S. 439 (1993) ("statutory construction * * * must account for a statute's full text, language as well as punctuation, structure, and subject matter")*; United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (referencing the court's duty to give effect, where possible, to every word of a statute); *see also In re Kingsville Naval Air Station,* 9 E.A.D. 19, 27 (EAB 2000) ("The Region cannot by artful interpretation of the first [term] eviscerate the second.").

In short, we see no basis for extending the exemption to entities falling outside the restricted class contemplated by the regulation, and we reverse the ALJ's contrary ruling.

III. *CONCLUSION*

For the above reasons, we decline to overturn the ALJ's conclusion that Consumers cannot on the facts before us be penalized under both Counts I and II, and affirm the ALJ's denial of Region V's motion for accelerated decision with respect to Counts I, II, IV, and V.

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[35](...continued)
C.F.R. § 260.10 – the provision containing the definition of "on-site" for purposes of RCRA generally, including for purposes of the used oil regulatory program). There are also indications that 40 C.F.R. §279.29(b)(2) – the federal counterpart to Mich. Admin. Code r. 299.9813(c)(iv) – was influenced by the further desire to extend the usable life of oil in the hands of the manufacturer rather than putting it on a disposal path. *See* 59 Fed. Reg. 10,550, 10,555 (Mar. 4, 1994). Since Michigan's regulatory program was, as a prerequisite for approval, determined to be consistent with the Federal program, it is reasonable to infer that similar considerations were at work in the determination in the Michigan code to exempt on-site draining activities by generators. *See* 51 Fed. Reg. 36,804, 36805 (Oct. 16, 1986).

We reverse the ALJ's conclusion regarding the legal sufficiency of Consumers' verification records and his dismissal with prejudice of Counts IV and V. We remand this matter for further proceedings consistent with this Decision.

So ordered.